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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. 317

LOUIS E. McMAHAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Seventh Circuit**

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UNITED STATES OF AMERICA,
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## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Seventh Circuit**

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on March 3, 1970.

### OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported, but is printed as Appendix A, *infra*.

## JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*) was entered on March 3, 1970. A timely petition for rehearing was denied on April 27, 1970. On May 18, 1970, Mr. Justice Brennan extended the time for the filing of a petition for writ of certiorari to June 26, 1970. The jurisdiction of this Court is invoked under 28 U. S. C., 1254(1).

## QUESTIONS PRESENTED

I. Where a Court of Appeals holds that irrelevant testimony was in fact introduced by the government and erroneously admitted at trial, does the defendant have the burden of proving that the error was prejudicial, and if so, does the defendant not only have to show that the minds of the jurors were prejudiced, but that they were prejudiced to a certain degree, before sustaining his burden of proof?

II. In a conspiracy trial, is it reversible error to admit prejudicial evidence of different transactions which do not relate to the common object of an alleged scheme or conspiracy, such transactions being either fully irrelevant or tending to prove separate and multiple schemes and conspiracy?

III. Is a trial Court's failure to give an accomplice instruction plain error where the major portion of the government's evidence is adduced through testimony of accomplices who were also co-defendants who had previously entered pleas of guilty to the same indictment?

IV. Where a Court does instruct the jury on the credibility of witnesses, is it plain error to instruct the jury that they have the option to, but are not required to, disregard evidence as to which a witness has sworn falsely?

V. Was the holding by the Court of Appeals that a proper objection was not made to the introduction of irrelevant and prejudicial evidence correct, where defense counsel at trial moved for a mis-trial and objected to the introduction of the evidence on the grounds that "it is irrelevant and immaterial, it isn't within the scope of the indictment * * *"?

VI. In a conspiracy trial, must the trial court instruct the jury that in order to convict they must find a single conspiracy and scheme?

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

15 U. S. C., Section 77(q)(a) provides:

"(a) It shall be unlawful for any person in the offer or sale of any securities or the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) To employ any device, scheme, or artifice to defraud, or

(2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

18 U. S. C., Section 1341, provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining

money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both."

15 U. S. C., Section 77(e)(a) provides:

"Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) To make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;

(2) To carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

18 U. S. C., Section 371, provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud

the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both."

Fifth Amendment, Constitution of the United States, provides in pertinent part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

## STATEMENT

The indictment in sixteen counts charged fifteen substantive violations of mail fraud and the Securities Act of 1933, and the conspiracy to commit such substantive violations. All six defendants, including petitioner, were charged in each count of the indictment. Co-defendants Vernon Mendenall, Charles Barbre, Malcolm Rudolph and Glen McCowen, all entered pleas of guilty to certain counts of the indictment and testified at trial as government witnesses against the petitioner. Counts three, seven, eight, thirteen, fourteen and fifteen were dismissed by the government just prior to trial (Tr. 3).[1] The jury found petitioner guilty on counts one, eleven, twelve and sixteen and found him not guilty on the remaining six counts. The District Court entered a judgment of conviction on the verdict, and sentenced the petitioner to four years imprisonment on count one, fined him $5,000.00 on count eleven and $1,000.00 on count twelve, and placed petitioner on probation for five years on count sixteen.

The four counts upon which petitioner was found guilty included: count one, charging petitioner with a violation of 15 U. S. C., Section 77(q)(a) by defrauding purchasers

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[1] "Tr." and "Ex." references are, respectively, to the typewritten transcript of the trial proceedings and the exhibits received at the trial, all now on file with this Court.

of stock in Southern United Life Insurance Company[2]; count eleven, charging petitioner with violation of 18 U. S. C., Section 1341, by causing to be mailed certain insurance stock certificates; count twelve, charging petitioner with violation of 15 U. S. C., Section 77(e)(a), by causing to be mailed certain stock certificates which had not been registered with the Securities Exchange Commission; and count sixteen, charging petitioner with violation of 18 U. S. C., Section 371, by conspiring with other named persons (all co-defendants and certain alleged co-conspirators) to violate the above-mentioned substantive statutes.

**The Object of the Alleged Conspiracy**

Count one of the indictment alleged that petitioner and all codefendants willfully and knowingly in the offer and sale of securities of Southern United Life Insurance Company, did employ a device, scheme and artifice to defraud and did obtain money and property by defrauding purchasers of stock in Southern United Life Insurance Company. Also, it was charged that some officers and directors of Southern United, including petitioner, did vote themselves options whereby they could purchase securities of such company for thirty cents a share. Finally, the indictment charged a two-fold object of the conspiracy and scheme:

(1) To defraud purchasers of stock in Southern United by making false statements, representations and promises; and

(2) That co-defendant Vernon Mendenall **induced** certain officers and directors of Southern United, including petitioner, to exercise their options to purchase stock in said company thereafter obtaining from said petitioner

[2] Hereinafter sometimes referred to as "Southern United."

and officers their stock therein. The indictment also alleged that co-defendant Mendenall was assisted in his sale and distribution of Southern United stock to the purchasers by his agents, namely, co-defendants Barbre, Rudolph, Jack Mendenall (a brother) and Glen McCowen. It was also alleged that co-defendant Mendenall and his agents did sell securities to persons to whom he or his agents had previously sold insurance and thereby took advantage of a "fiduciary relationship" created by such previous association with such persons.

Prior to trial, petitioner filed a motion for "relief from prejudicial joinder of defendants and offenses" and a motion to Dismiss. Petitioner's motions stated that the offenses charged in the indictment involved different times, places and people and that the allegations were not a part of a common plan and that the indictment was too vague. All pre-trial motions filed by petitioner were overruled by the trial Court.

The evidence adduced at trial may be briefly summarized as follows:

In early 1962, petitioner helped procure an insurance charter from the State of Arkansas for Southern United Life Insurance Company (Tr. 492-519). Over defense counsel's objection, co-defendant Vernon Mendenall testified for the government, and stated that he lived in the State of Illinois and that in January, 1962 he first heard of Southern United from one Sidney E. Porter and one Marion L. Watkinson who are alleged in the indictment to be officers and directors of Southern United. Mendenall testified that Porter and Watkinson came to his insurance agency office in Mt. Vernon, Illinois and told him that they wanted to sell stock that they held in Southern United to Mendenall. The defense objected to said testimony on the grounds that it was hearsay (Tr. 18-20).

Mendenall testified that Porter and Watkinson told him that he could resell the shares of stock legally and that Porter delivered the stock to Mendenall in Illinois two or three days later. Mendenall paid for said stock (Tr. 21-22).

Mendenall testified that a month or so later, in the Spring of 1962, that he met petitioner for the first time and that petitioner requested that Mendenall buy and sell secondary stock. This meeting took place in Mendenall's office.

The evidence shows that Mendenall thereafter set up a sales organization in Illinois, which sold stock in Southern United to a number of persons, some of whom testified at trial. After sales of stock were made, the proceeds therefrom were sent to the home office of Southern United in Little Rock, Arkansas, and Southern United sent by mail or delivered by hand the stock certificates to the purchasers living in Illinois. The stock of Southern United was not registered with the Securities and Exchange Commission and was not registered in the State of Illinois.

Mendenall testified that he was not an agent for Southern United, but merely sold his own stock in said company (Tr. 202). He stated that petitioner told him that Southern United was doing very well businesswise, but that subsequently, in May, 1962, Mendenall went to the office in Little Rock, and did not see any selling activity at that time (Tr. 332-333). Mendenall testified that he went to Little Rock, Arkansas, again in September, 1962, and that the company was very busy at that time with the insurance business (Tr. 335-336). Mendenall did not look at any records of the company.

Mendenall testified that petitioner had told him that Southern United's attorney had advised petitioner that the sales of the secondary stock in the State of Illinois was legal (Tr. 82-83).

Joy Faulkner testified that she was employed by Southern United on or about January 20, 1962, as secretary for the purpose of doing general office work and that she first met the petitioner in the latter part of January or February, 1962. She testified that the defendant did not move to Arkansas until June, 1962 (Tr. 850-852).

Joy Faulkner testified that she did issue stock when requests came in from Vernon Mendenall or some of his men located in the State of Illinois. She further testified that there was insurance in force and that Southern United was operating as an insurance company at this time. She also testified that Vernon Mendenall worked on insurance policies and insurance matters from May, 1963, through June 15, 1963, and that the company had sixty-five to seventy agents selling life and accident policies, including co-defendants Barbre, Rudolph and Mendenall (Tr. 923). She also testified that petitioner gave her instructions that no stock certificate was to leave the office unless it was paid for and that all minutes of the company, which included the recording of the stock options granted the officers and directors would be first passed upon by Southern United's attorney (Tr. 929-930). She testified that Vernon Mendenall was in control of the company after June 8, 1963 (Tr. 939-942).

**Irrelevant and Prejudicial Evidence Adduced at Trial**

1. **Columbia Investment Company.**

Wilmore Hastings, attorney-examiner for the Securities Division of the State of Illinois and testifying as a government witness, stated that he was in court by a reason of a subpoena duces tecum to produce all documents and records pertaining to Southern United, including a copy of a temporary restraining order issued to Southern United by the State of Illinois (Tr. 412-414).

Hastings also testified that he had received another subpoena duces tecum to produce another file, namely, that of Columbia Investment Company. He stated that he had brought a cease and desist order for that company also .(Tr. 416-417). The defense moved for a mistrial (Tr. 417-418). The government introduced government Exhibit No. 22 which was the cease and desist order to prohibit the sale of securities in Illinois by Columbia Investment Company. Other government exhibits (Ex. 23-25) concerning Columbia Investment Company were produced by Hastings and were subsequently admitted into evidence (Tr. 1354), although the defense had previously asked the trial Court to reserve ruling thereon (Tr. 489).

Immediately after attorney-examiner Hastings testified, government witness Dennie Horton testified that he first met the petitioner in December, 1960, in St. Louis (Tr. 433). The government prosecutor next asked witness Horton, "For what purpose did you travel to St. Louis?" (Tr. 434). The defense objected to the said question on the grounds that, "It's irrelevant and immaterial, it isn't within the scope of the indictment, starts in—October 1, 1961" (Tr. 434) [The indictment alleges that the conspiracy commenced on or about October 1, 1961]. The trial Court overruled defense counsel's objection, and Horton answered the question as follows: "In connection with Columbia Investment Corporation" (Tr. 434).

Horton then testified that the petitioner and Watkinson (Watkinson was the former officer of Southern United who Mendenall testified sold his stock to Mendenall in January, 1962) met with Horton in St. Louis in December, 1960. Horton also stated that he found out while in St. Louis that the Illinois Securities Department had entered a cease and desist order directed toward Columbia Investment Company (Tr. 435-436). Horton further connected petitioner with Columbia Investment Company by

identifying certain records showing that cash advances were made to the petitioner by the Columbia Investment Company on November 16, 1960, and that petitioner was otherwise connected with Columbia Investment Company (Tr. 438-446).

Horton further testified that on January 29, 1962, he traveled to Springfield, Illinois, to visit the Securities Department office for the purpose of investigating Columbia Investment Company's possible violation of the Securities Laws of Illinois. Horton stated that petitioner was not named as a defendant or mentioned in the cease and desist order (Tr. 473). There was no proof adduced at trial that petitioner had any knowledge of the cease and desist order or had knowledge of any possible violations by Columbia Investment Company in the State of Illinois (Tr. 473).

Horton testified that he subsequently went to work as an accountant for Southern United, but that in January, 1962, he left the company for the reason that he did not think it was doing sufficient business to afford paying him for his accounting work.

2. **Prior Misconduct by Accomplices.**

Glen McCowen, a government witness and a co-defendant who plead guilty prior to petitioner's trial, testified that he worked for the Vernon Mendenall Insurance Agency in Mt. Vernon, Illinois, in the Spring of 1962. While working for Mendenall, he first learned of the Southern United Life Insurance Company. He stated that he met the petitioner at the office of Vernon Mendenall and learned that they were intending to sell stock in Southern United in the State of Illinois. McCowen testified that defendant told him that Southern United was doing very well and selling a lot of insurance (Tr. 550). McCowen testified that he thereupon sold stock to certain

people in the State of Illinois and that he told the people that the company was doing well (Tr. 557).

Malcolm Rudolph, another co-defendant, testified that petitioner told him that it was okay to sell the stock of Southern United in Illinois (Tr. 614-615), and that Mendenall told him that the stock was registered (Tr. 621).

Rudolph testified that because he had previously been in trouble for selling unregistered securities in Illinois, he went to Southern United's office in Little Rock, Arkansas, in July, 1962, to check on whether it was okay to sell the stock. Rudolph testified that the office in Little Rock, Arkansas, was busy at that time and that therefore he subsequently told purchasers that the company had all the possibilities in the world of being a good company. He stated that any representations to purchasers that he made was based upon the information he obtained from Mendenall, the petitioner and "from the general appearances of the company" (Tr. 652-653). He stated that this was based upon his actual observations when he saw the facilities of Southern United in Little Rock, Arkansas (Tr. 653, 623).

Charles Edward Barbre, a co-defendant, testified as a government witness, and stated that he first met petitioner ten years ago (Tr. 754-755). Over objection he testified that he was employed in a restaurant in 1961 and 1962 and that prior thereto, he had been a registered securities dealer, but that his license had been revoked by the State of Illinois for selling non-registered stock (Tr. 755-756).

Barbre further testified over objection, that Malcolm Rudolph (a co-defendant and government witness) called on him in July, 1962, and thereafter accompanied him to Vernon Mendenall's office in Mt. Vernon, Illinois (Tr. 759-760). Barbre testified that he thereafter went to South-

ern United's office in Little Rock, Arkansas, where he met with the petitioner, Vernon Mendenall and Malcolm Rudolph and that the petitioner told him that the stock of Southern United was registered (Tr. 763). He also testified that he sold stock for Southern United and that his financial transactions were with co-defendant Mendenall (Tr. 768).

3. **Arkansas State Life Insurance Company and Other Irrelevant and Prejudicial Evidence.**

Charlotte Gieseking, a government witness, testified generally that she purchased some stock in Southern United from Vernon Mendenall in April, 1962 and that she had previously known Mendenall because she had purchased insurance from him in another company. Although not asked by government counsel about Arkansas State Life Insurance Company (Tr. 1267), she replied that co-defendant McCowen came to her house and told her that he knew that she had stock in Southern United because he knew co-defendant Mendenall, but that he was selling Arkansas State Life Insurance Company stock. McCowen told her that the Arkansas State Life Insurance Company was a little better than Southern United because it was already operating in the black (Tr. 1267). Mrs. Gieseking identified government exhibits 141 and 142 showing that she purchased stock in Arkansas State Life Insurance Company.

Defense counsel moved for a mistrial on the grounds that the government was introducing evidence of another crime for which petitioner was not charged and that the trial Court could not cure this prejudice by an instruction to the jury (Tr. 1268-1269).

Out of hearing of the jury, government counsel contended that there had been other testimony about Arkan-

sas State Life Insurance Company (Tr. 1269) and stated as follows:

> "Now if the Court feels that there is a possible prejudice to this defendant as to the sale of the Arkansas State Life stock, then it seems to me that the Jury can be instructed to disregard——."

The Court interrupted, stating: "What did you offer it for?" (Tr. 1270).

Government counsel then stated that he did not feel it was error, and the Court asked: "Well, you tell me whether or not it is error, that's what I want to know."

Government counsel replied, "No, your Honor, it's not error . . ." (Tr. 1270).

The Court then stated that he was going to instruct the jury to disregard the evidence and that government counsel should not ask anything further concerning the transaction for the reason that we "don't want to try this case for eight days for nothing" (Tr. 1272).

The Court subsequently instructed the jury to disregard any testimony about the Arkansas State Life Insurance Company and that it had no connection with this petitioner (Tr. 1273). Government counsel proceeded to introduce more evidence concerning subsequent sales by co-defendant McCowen to Mrs. Gieseking of Southern United stock.

Mr. Martin Fuchs testified that he purchased stock in Southern United and that on June 7, 1963 he went to a stockholders meeting in Little Rock, Arkansas (Tr. 1151). He also testified that at that time he was worried about Southern United and therefore went to the Director of Securities for the State of Arkansas (Tr. 1154). Over objection, he testified that the Director of Securities told

him that "the wheels of justice grind slowly, but what they grind they grind surely" (Tr. 1155).

The trial court admitted all evidence regarding conversations among co-defendants which occurred outside the presence of the petitioner over the objection of defense counsel (Tr. 1346-1350). Defense counsel's motion for judgment of acquittal was overruled (Tr. 1352-1355).

The defense presented a number of good character witnesses on behalf of petitioner and petitioner testified in his own behalf that he did not devise a scheme to defraud any person through the use of common stock of Southern United, that he had not entered into a conspiracy or agreement to conspire with any one and that although he exercised certain stock options during said period of time, that he had acted on advice of counsel (Tr. 1358). Thereafter, the trial court permitted extensive cross-examination of petitioner over objections of going beyond the scope of direct examination.

## COURT'S INSTRUCTIONS TO THE JURY

The trial Court failed to give an accomplice instruction or an instruction that if petitioner acted on the advice of counsel regarding the sale of securities that this would be a defense to the charges. However, the Court did instruct the jury over objection that:

> "[N]o amount of good faith belief, optimism or enthusiasm in the ultimate success of a venture will justify its promotion by false and reckless representation" (Tr. 1481).

The Court also instructed the jury that:

> "If the jury believes that a witness has wilfully sworn falsely to a material fact in the case, the jury **may** disregard his testimony in whole or in part, ex-

cept insofar as it may have been corroborated by other credible evidence in the case" (Emphasis added) (Tr. 1550-1551).

The trial Court also instructed the jury on the law of conspiracy, but did not specifically charge that the jury must find a single conspiracy and scheme before they could enter a guilty verdict (Tr. 1562-1564).

## OPINION OF THE COURT OF APPEALS

With regard to the District Court's admission of certain evidence concerning the Columbia Investment Company, the Court of Appeals held that the defense had not objected to the introduction of the evidence and that petitioner had made no showing of plain error in the admission of said evidence.

With respect to the trial Court's admission of certain testimony concerning the Arkansas State Life Insurance Company, the Court of Appeals held that:

> "Although irrelevant testimony was admitted at trial, the burden is still on the appellant to demonstrate to the reviewing Court that the error committed in the admission of such testimony was prejudicial."

Next, the Court of Appeals held that the petitioner had not met his burden of proof for the reason that:

> "[H]e has not illustrated, nor does the record reveal, how the testimony in question **would** have prejudiced the minds of the jurors **to such a degree** that the explicit instruction by the District Court would not have cured the error" (App. A-5, *infra*).

The Court of Appeals also found that the other issues raised by the petitioner were without merit and that there was no error in the instructions given to the jury by the District Court.

## REASONS FOR GRANTING THE WRIT

### I. Multiple Schemes and Conspiracies and Irrelevant and Prejudicial Evidence Presented as One Single Scheme and Conspiracy to Defraud.

When this Court last reviewed the permissible scope of conspiracy prosecutions, it again warned that it would "view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." **Grunewald v. United States**, 353 U. S. 391, 404.[3] The present case presents a good opportunity for the Court to review and delineate the permissible limits of conspiracy prosecutions. If permitted to stand, it will broaden the wide-sweeping nets of conspiracy prosecutions in the following respects: (a) By the device of alleging, purportedly as a single scheme and conspiracy, unrelated representations and transactions in each of the sixteen counts of the indictment, the government has prosecuted multiple schemes and conspiracies as a single scheme and conspiracy, all to the prejudice of petitioner in conflict with the decision in **Kotteakos v. United States**, 328 U. S. 750; (b) By the same device the government was permitted to introduce evidence which was not material or relevant to the common object of the alleged scheme and conspiracy and which the Court of Appeals held was in fact irrelevant evidence, in conflict with decisions of this Court and the Circuit Courts of Appeals; (c) The trial Court's instructions erroneously failed to inform the jury that a finding of a single conspiracy and scheme was necessary for conviction, all in conflict with **Kotteakos v.**

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[3] See also **Krulewitch v. United States**, 336 U. S. 440; **Kotteakos v. United States**, 328 U. S. 750; **Lutwak v. United States**, 344 U. S. 604; **Delli Paoli v. United States**, 352 U. S. 232; **Bollenbach v. United States**, 326 U. S. 607; **United States v. Bufalino**, 2 Cir., 285 F. 2d 408; **United States v. Wortman**, 7 Cir., 326 F. 2d 717.

**United States**, *supra*, and **United States v. Borelli**, 2 Cir., 336 F. 2d 376. We discuss each of these aspects, starting with the introduction of irrelevant and prejudicial evidence.

A. **Irrelevant and Prejudicial Evidence—Issue of Burden of Proof and Effect of Cautionary Instruction.**

1. **Arkansas State Life Insurance Company**

As pointed out in our Statement and as held by the Court of Appeals, irrelevant testimony was admitted at trial, over the objection of the defense, concerning the Arkansas State Life Insurance Company. Thus, it is clear that the erroneously admitted evidence concerning the Arkansas State Life Insurance Company was irrelevant, was objected to and had no relation to the common object of the alleged conspiracy or the scheme alleged in count one of the indictment, i. e., the defrauding of purchasers of stock in Southern United Insurance Company. The approval of the admission of the evidence was therefore in conflict with the Seventh Circuit's own decision in **United States v. Wortman**, 7 Cir., 326 F. 2d 717; and with **United States v. Crimmins**, 2 Cir., 123 F. 2d 271; **United States v. Peoni**, 2 Cir., 100 F. 2d 401. Cf. **Krulewitch v. United States**, 336 U. S. 440; **Grunewald v. United States**, 353 U. S. 391; **Forman v. United States**, 361 U. S. 416; **Fiswick v. United States**, 329 U. S. 211, 217.

The crimes of fraud alleged in the indictment and the crime of conspiracy is limited by the scope of the mutual agreement among the conspirators. When the government attempts to prove a conspiracy by circumstantial evidence, the extent and limit of the common agreement, as in any circumstantial evidence case, must reasonably flow from the circumstances proved. The government may not set the scope of the common agreement simply by allega-

tion. **Kotteakos v. United States**, *supra*; **United States v. Wortman**, *supra*. The government's own proof and the indictment here established that the claimed agreement was limited by a conspiracy to defraud purchasers of stock in Southern United. Nevertheless, the government threw together, and was permitted to introduce evidence over objection of other transactions touching some of the alleged conspirators which did present the petitioner in a bad light to the jury. **United States v. Wortman**, *supra*. The prosecution was not based on "definite proof of specific crime." **United States v. Bufalino**, 2 Cir., 285 F. 2d 408, 420. Clearly, the irrelevant testimony concerning Arkansas State Life Insurance Company was not relevant to the conspiracy and scheme which was charged.

**Burden of Proof**

The Court of Appeals held that the introduction of the irrelevant testimony was not reversible error because the petitioner failed to demonstrate that the **error** committed was prejudicial. The Court reasoned that the petitioner had failed to show that the "testimony in question would have prejudiced the minds of the jurors **to such a degree** that the explicit instruction by the District Court would not have cured the error." (Emphasis added. Appendix A, *infra*, at 19) Thus, the Court of Appeals held that it will affirm a conviction even though erroneously admitted evidence might have prejudiced the minds of the jurors to a certain undefined degree. Apparently, the Court of Appeals has applied a new "test" regarding a defendant's burden of proving prejudice by holding that the defendant must not only show prejudice, but must also prove that the minds of the jurors were prejudiced to a certain "degree".

The writ should be granted for the reason that the Court of Appeal's new "test" to determine whether a de-

fendant has sustained his burden of proving prejudice is erroneous. We submit that the test used by this Court in **Fahy v. Connecticut**, 375 U. S. 85, should be followed and that "the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U. S. 85, 86-87. **Fahy** held that an error in admitting plainly irrelevant evidence which possibly influenced the jury adversely to a litigant cannot be conceived of as harmless, and, as this Court stated in **Chapman v. California**, 386 U. S. 18, 24, "[c]ertainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless."

Here, the Court of Appeals not only erroneously placed the burden upon the defendant, but increased that burden by speculating as to what "degree" the evidence prejudiced the minds of the jurors.

The Seventh Circuit's opinion is in conflict with the Sixth Circuit Court of Appeal's decision in **United States v. Rudolph**, 403 F. 2d 805, wherein that Court reversed where the defendant was asked on cross-examination as to whether he participated in an unrelated criminal act (murder). The Sixth Circuit held that the prejudicial error was not cured by the Court's instruction to the jury to disregard said evidence and stated as follows:

> "It must be remembered that after the saber thrust, the withdrawal of the saber, still leaves the wound." 403 F. 2d at 807.

Also, here the basis for the Court of Appeal's conclusion that there was no reversible error is unclear. For instance, does the Court of Appeals hold that the introduction of the evidence was not reversible error because the trial Court gave a cautionary instruction to the jury,

thus removing the prejudice? Or, did the Court of Appeals hold that the erroneously admitted evidence was not in fact prejudicial to the petitioner?

With regard to the issue of prejudice, we submit that the evidence was clearly prejudicial to petitioner for the reason that it had the effect of presenting petitioner in a bad light to the jury. Petitioner was indicted for alleged acts involving elements of fraud, deceit and, in general, bad faith. In order to assess fairly the integrity of the petitioner, the absolute exclusion of all irrelevant and prejudicial evidence tending to create an impression of general impropriety was vital.

Even the trial Court apparently recognized the prejudicial nature of the evidence for as soon as the defense moved for a mistrial on the grounds that the government was presenting evidence accusing the petitioner of another crime not alleged in the indictment and that the Court could not cure the prejudice by an instruction, the Judge conducted a hearing outside the presence of the jury (Tr. 1268-1269). The trial Court first asked government counsel why he offered the evidence and whether or not government counsel thought it was error (Tr. 1270). Government counsel replied that he did not think it was error, but the trial Judge concluded that he would instruct the jury to disregard said evidence.

This irrelevant and prejudicial evidence invited the jury to speculate as to what might have been the petitioner's association with Arkansas State Life. The possibilities of prejudice are multiplied when considered in light of the fact that no proof was introduced that the petitioner had any connection with Arkansas State Life. However, the jury might still have speculated that the petitioner had some connection for the reason that government witness McCowen, who was also a co-defendant in the instant case, was named as the person selling or attempting to sell the Arkansas State Life stock.

**Cautionary Instruction**

Accepting the Court of Appeal's conclusion that said evidence was irrelevant and the trial Court's apparent conclusion that it did prejudice the petitioner, the crucial question remaining is whether the prejudice was cured or removed by the Court's cautionary instruction to the jury.

While this Court has stated that not every admission of inadmissible evidence must be considered to be reversible error, it seems clear that the caveat applies more appropriately to those "instances [which] occur in almost every trial where inadmissible evidence creeps in, usually inadvertently." **Bruton v. United States**, 391 U. S. 123. Here we think it is clear that said evidence was prejudicial to petitioner, therefore requiring reversal of the conviction.

This case raises a novel issue interpreting **Bruton's** recent revitalization of the philosophy of **Jackson v. Denno**, 378 U. S. 368, repudiating the adequacy of limiting instructions as a sufficient device for preserving a fair trial. See also **Burgett v. Texas**, 389 U. S. 109; **United States v. Smith**, 6 Cir., 403 F. 2d 74. Here, the evidence was excluded and the government counsel was questioned by the trial court concerning the introduction of the poisonous matter. Here the trial Court, in apparent belief that the evidence was prejudicial, refused to allow the matter to stand against petitioner after weighing the damages against the benefits.

While this Court has by its **Bruton** decision strongly undercut the proponents of cautionary instructions as the panacea for obvious trial errors, this case requires an interpretation of the circumstances in which a cautionary instruction will suffice in a trial and therefore the writ should be granted.

## 2. Columbia Investment Company

Additional irrelevant and prejudicial evidence was introduced by the government at trial concerning the Columbia Investment Company. The Court of Appeals held that there was no objection made to the introduction of said evidence and therefore, there was no showing of "plain error" in the admission of the evidence. We submit that said holding is erroneous for the reason that the defense, immediately after government counsel mentioned the cease and desist order against Columbia Investment by the State of Illinois Securities Department, moved for a mistrial. The motion for mistrial was overruled making further objections to the testimony unnecessary.

Additionally, government witness Horton, who was the next witness, testified over objection concerning the cease and desist order and that financial records of that company showed that payments were made to the petitioner. Horton also testified that he later found out that the Illinois Securities Department was concerned over Columbia Investment Company and that there was a possible violation of the Securities Laws of the State of Illinois. Although there was no proof showing that the petitioner knew about any possible difficulty with the Illinois Securities Department concerning Columbia Investment Company, we submit that the introduction of said evidence over the defense counsel's objection invited the jury to speculate concerning what might have been the petitioner's association with Columbia Investment Company.

The Court of Appeals in affirming the conviction, overlooked or misapprehended the impact which the irrelevant, prejudicial evidence described above might have had on the jurors, thereby depriving the petitioner of the opportunity to have his case fairly adjudicated.

B. **Erroneous Instructions to the Jury and Failure to Require Finding of a Single Conspiracy.**

The case was submitted to the jury without a clear instruction requiring the jury to find a single conspiracy and scheme. This is in direct conflict with **United States v. Borelli**, 2 Cir., 336 F. 2d 376. See also **Grunewald v. United States**, 353 U. S. 391; **Kotteakos v. United States**, *supra*. The Court instructed the jury that it was a conspiracy to commit the offense or offenses to commit the crime which is charged, "and it may be established regardless of whether the **purposes** of the conspiracy were accomplished * * *" (Tr. 1561-1562). Although the Court did instruct that the government must prove beyond a reasonable doubt that a defendant was aware of the common purpose, additional instructions by the Court failed to apprise the jury that it must make the crucial determination of whether the government's evidence proved the existence of one conspiracy and scheme or of several conspiracies and schemes.

Contrariwise, the Court instructed the jury that:

> "If it is established . . . that a conspiracy existed, and that defendant was one of its members, then the acts and declarations of any other member of such conspiracy in or out of such defendant's presence, done in the furtherance of the **objects** of the conspiracy . . . may be considered as evidence against such defendant" (Emphasis added. Tr. 1563).

Further, the Court instructed that "It is necessary only that such act [overt act] be in furtherance of the purpose or **objects** of the conspiracy" (Tr. 1564). The court also charged that

> "If the jury finds . . . that a conspiracy existed . . . and that . . . one of the overt acts alleged was knowingly done by one or more of the conspirators in

furtherance of **some** object of the conspiracy, proof of the conspiracy offense is then complete" (Tr. 1564).

So, contrary to **Kotteakos**, the jury was permitted to find petitioner guilty even though the jury might well have found that he was guilty of some other conspiracy or conspiracies other than the conspiracy to defraud purchasers of stock in Southern United. For instance, the jury might have thought from the evidence that petitioner defrauded the co-defendants or accomplices.

This case thus presents important questions of general applicability as to what limits on the scope of conspiracy prosecutions are necessary for a fair trial for a specific offense.

C. **Indictment Alleged Multiple Schemes and Conspiracies.**

The decision below is in conflict with **Kotteakos v. United States**, *supra*, and a line of Court of Appeals' decisions based thereon,[4] which hold that it is a prejudicial misjoinder of defendants where the government prosecutes multiple conspiracies and schemes, each of which does not involve all of the defendants, as one single scheme and conspiracy. Apparently, the Court below agreed that the central purpose of the alleged conspiracy and scheme was to defraud purchasers of stock in Southern United Life Insurance Company. Thus, it is apparent, that unless the evidence introduced by the government tended to prove this ultimate fact, such evidence either established a separate scheme and conspiracy or was wholly irrelevant.

In his pre-trial motions, the petitioner raised the objection to the validity of the indictment, contending that the

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[4] **United States v. Goss**, 4 Cir., 329 F. 2d 180; **United States v. Russano**, 2 Cir., 257 F. 2d 712; **Rocha v. United States**, 9 Cir., 288 F. 2d 545; **Daily v. United States**, 9 Cir., 282 F. 2d 818; **Canella v. United States**, 9 Cir., 157 F. 2d 470.

indictment alleged more than one conspiracy. For instance, the indictment alleged that co-defendant Mendenall "induced" petitioner and other officers of Southern United to exercise their options. Mendenall plead guilty to this count in the indictment. Further, as stated previously, the government did introduce irrelevant evidence concerning Columbia Investment Company and the Arkansas State Life Insurance Company. Additionally, co-defendants, who testified as government witnesses, testified that the petitioner misrepresented and defrauded said co-defendants.

Thus, many of the transactions alleged and proved were not part of the same series of acts or transactions constituting an offense or offenses as required by Rule 8(b), Federal Rules of Criminal Procedure, for the joinder of defendants. Some of the evidence introduced by the government had no relation at all to the common object of the alleged conspiracy. There was no showing that said transactions constituted a series of acts or transactions necessary for the joinder of all defendants in each count of the indictment. This case thus presents important questions of general applicability as to what limits on the scope of conspiracy prosecutions are necessary for a fair trial for a specific offense.

## II. The Court's Instruction to the Jury on the Issue of Credibility of Witnesses Was Erroneous in That It Did Not Require the Jury to Disregard Testimony as to Which It Found a Witness Had Sworn Falsely.

In its final charge to the jury, the trial Court instructed the jury that if they believed that a witness had wilfully sworn falsely to a material fact in the case, the jury could disregard his testimony in whole or in part except insofar as it may have been corroborated by other credible evidence in the case (Tr. 1550-1551).

This instruction and similar ones, referable to the maxim, *falsus in uno, falsus in omnibus* have been severely criticized and as reviewed in 4 A. L. R. 2d 1078, the view gaining increasing support seems to be that however such instructions are phrased, they are "in practice and total result insupportable." 4 A. L. R. 2d 1078. It is there stated that such instructions "are open to such misconstructions, and involve such real doubts as to their true meaning and intent, and are so often, as by accidental or seemingly innocent interchange of words, or the misplacement of a single word . . . so seriously prejudicial . . . as to amount to a deplorable encumbrance on the administration of justice." 4 A. L. R. 2d 1078-79.

Petitioner urges this Court to grant the writ to review the legality of the instant instruction and similar instructions. These instructions are erroneous in that although it permits the jury to disregard the entire testimony of a witness who has sworn falsely, it conversely does not **require** them to disregard testimony which they believe is false. The instruction merely gives the jury an **option**, without requiring them to disregard that portion of a witness' testimony which they believe to have been wilfully false. In any event if this Court in its review of said instructions should determine that the trial Court may choose to give such an instruction, we submit that here the Court did in fact misdirect the jury and therefore the conviction should not stand.

A defendant accused of crime has a right to a correct statement of the law from the trial judge. **Thomas v. United States**, 6 Cir., 151 F. 2d 183. It is the Judge's duty to instruct the jury correctly on the law. **Carrado v. United States**, D. C. Cir., 210 F. 2d 712, 722. Thus, although the defense here did not object to the giving of said instruction, we submit that the trial Court committed plain error in giving said instruction, thus misdirecting the jury.

The instruction in question, when given, must be correct as to its essentials. 23 C. J. S., Criminal Law, Section 1259, p. 641. Though it has not been uniformly interpreted and applied, its general substance is that where a witness swears falsely as to a portion of his testimony, that portion must be disregarded, and the jury is at liberty to disregard the remainder of the witness' testimony. See **American Automobile Insurance Company v. Taylor**, N. D. Ill., 52 F. Supp. 601.

This case presents an opportunity for the Court to determine whether the instant instruction or similar instructions should be given at all, and if so, whether a jury should be instructed that it does have the option to consider and accept testimony which they find to be false.

III. **The Trial Court's Failure to Caution the Jury About the Accomplices' (Co-Defendants') Testimony Was Plain Error.**

Although the Court instructed the jury that in weighing the defendant's testimony, they "should consider the fact that the defendant has a vital interest in the outcome of this trial" (Tr. 1566), the trial Court failed to caution the jury about the accomplices' testimony. Also, even though the failure of the trial Court to give the cautionary instruction was not raised during the trial, we submit that the Court of Appeals opinion in affirming the conviction below is in conflict with the Fifth Circuit Court of Appeals opinion in **Tillery v. United States**, 5 Cir., 411 F. 2d 644. In **Tillery**, the Fifth Circuit held that the jury was not cautioned about the unreliable nature of accomplice's testimony and that the failure of the trial Court to so advise them, under the facts of that case, was plain and reversible error.

Here, the prosecution's hope for conviction hinged almost exclusively upon the persuasiveness of accomplices' testimony. Surely, without such testimony, the petitioner would have been acquitted. Also, here the evidence of guilt of petitioner was not overwhelming, as is evidenced by the fact that the jury retired and started deliberations at 12:45 p. m. and did not reach a verdict until 10:15 p. m. Thus, petitioner urges this Court to grant the writ and review and set out guidelines when the cautionary accomplice instruction **must** be given by a trial Court. As Judge Learned Hand stated in **United States v. Becker**, 2 Cir., 62 F. 2d 1007, the failure to give the warning in close cases "* * * may turn the scale."

Here, the question of guilt was unquestionably a close one and this Court is confronted with the issue of whether the testimony of the co-defendants or accomplices was so critical that the traditional caveat as to its evaluation and use was an indispensable part of the trial Court's charge to the jury.

## CONCLUSION

For all the reasons advanced, the petition should be granted.

Respectfully submitted

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## APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

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September Term, 1969—January Session, 1970

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No. 17473

Louis E. McMahan,
Defendant-Appellant,

v.

United States of America,
Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

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March 3, 1970

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Before Duffy and Castle, Senior Circuit Judges, and Kerner, Circuit Judge.

Castle, Senior Circuit Judge. In a sixteen-count indictment, the Grand Jury charged defendant with violations of the Securities Act of 1933, mail fraud, and conspiracy to commit such acts. Counts 3, 7, 8, 13, 14, and 15 were dismissed by the Government. The jury found defendant guilty on Counts 1, 11, 12, and 16, and not guilty on the remaining counts. The district court entered judgment of conviction on the verdict, sentenced defendant to four years imprisonment on Count 1, fined him $5000 on Count 11 and $1000 on Count 12, and placed defendant on probation for five years on Count 16.

The trial was lengthy and involved the testimony of numerous witnesses, including some of the sales people and investors allegedly defrauded by defendant's scheme. The four counts upon which defendant was found guilty included: Count One, charging defendant with a violation of 15 U. S. C., §77(q)(a)[1] by defrauding purchasers of stock in Southern United Life Insurance Company; Count Eleven, charging defendant with violation of 18 U. S. C., §1341[2] in causing to be mailed certain insurance stock

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[1] §77(q)(a) provides:

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

[2] §1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

certificates; Count Twelve, charging defendant with violation of 15 U. S. C., § 77(e)(a)[3] in causing to be mailed certain stock certificates which had not been registered with the Securities Exchange Commission; and Count Sixteen, charging defendant with violation of 18 U. S. C., § 371[4] in conspiring with other named persons to violate the above statutes.

The record, when viewed in a light most favorable to the Government, with all reasonable inferences to be drawn therefrom, *Glasser v. United States*, 315 U. S. 60, 80 (1942), reveals the following facts. In 1962, defendant procured an insurance charter from the State of Arkansas for Southern United Life Insurance Company. Thereafter, defendant made certain representations to various persons, including investors and stock salesmen, that Southern United was very prosperous, when in fact the company was in very poor financial condition. When stock of the company was sold, defendant would receive the money and deliver the stock certificates either by mail or by hand. Contrary to the securities laws, the stock of the

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[3] § 77(e)(a) provides:

> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

[4] § 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

company was not registered with the Securities Exchange Commission. Also, it was not registered in the State of Illinois, where the sales organization had been set up.

On appeal, defendant first contends that the district court erred in permitting co-conspirators to testify regarding conversations in furtherance of the conspiracy which occurred outside the presence of defendant. It appears from the record that the court below received such testimony, reserving ruling on defendant's objections thereto, subject to the Government's connecting up, by independent evidence, the evidence necessary to establish the conspiracy.

It is well-settled that the declarations of one conspirator in furtherance of the objects of a conspiracy made to a third party are admissible against his co-conspirators. *Glasser v. United States*, 315 U. S. 60, 74 (1942); *Logan v. United States*, 144 U. S. 263, 308-309 (1892); *United States v. Konovsky*, 202 F. 2d 721; 727 (7th Cir. 1953). Such statements are admissible subject to the conspiracy being established to the satisfaction of the trial court — thus often requiring a reserved ruling on defense objections. If a conspiracy is so established by independent evidence, the court may then overrule the objections. This Court, sitting *en banc*, has approved such a procedure. *United States v. Allegretti*, 340 F. 2d 254, 256 (7th Cir. 1964). Thus, in the instant case, we perceive no error in the procedure followed by the district court in permitting the introduction of the testimony nor in its ultimate ruling as to the admissibility of such testimony as to the defendant.

Defendant next argues that the district court erred in admitting certain evidence concerning a cease and desist order against Columbia Investment Company, which allegedly was irrelevant to and unconnected with the offenses

charged in the indictment. However, no objection was made to the introduction of this evidence at trial. Absent a showing of plain error, an assignment of error which was not raised in the court below will not be heard on appeal. *United States v. Lookretis*, ... F. 2d ... (7th Cir., February 5, 1970, slip opinion p. 6); *United States v. Gulley*, 404 F. 2d 534, 536 (7th Cir. 1968); Rule 52(b), Fed. Rules Crim. Proc. We find that no showing of plain error in the admission of the evidence complained of has been made in the instant case.

Defendant also urges that prejudicial error was committed by the district court in admitting certain testimony concerning the Arkansas State Life Insurance Company, with which defendant was never connected. The Government argues that the error in admission of the testimony in question was harmless in light of the court's instruction to the jury to disregard it.

Although irrelevant testimony was admitted at trial, the burden is still on the appellant to demonstrate to the reviewing court that the error committed in the admission of such testimony was prejudicial. *Ryno v. United States*, 232 F. 2d 581 (9th Cir. 1956). We are of the opinion that defendant has not met this burden in the instant case since he has not illustrated, nor does the record reveal, how the testimony in question would have prejudiced the minds of the jurors to such a degree that the explicit instruction by the district court would not have cured the error.

Defendant next contends that the district court erred in admitting into evidence certain documents which were filed with the Commissioner of the Arkansas State Insurance Department, concerning Southern United Life Insurance Company, and the testimony of the Executive Assistant Commissioner of that Department interpreting

those documents. We believe that the documents themselves were clearly admissible under the "public documents" exception to the hearsay rule. 5 Wigmore on Evidence, § 1630, et seq. (3d Ed. 1940). Since no objection was made to the witness' qualifications as an expert in the financial aspects of Arkansas insurance companies, his opinions concerning the documents were admissible as expert testimony. 7 Wigmore on Evidence, §§ 1918, 1923 (3d Ed. 1930). The fact that the witness was not in office at the time the documents were filed is therefore irrelevant.

Defendant raises certain other issues which the Court has examined and finds the defendant's contentions with respect thereto to be without merit. Thus, we find no error in the instructions given to the jury by the district court, nor in the court's having given the indictment to the jury. Likewise, there was no error in the Government's cross-examination of the defendant.

The judgment of conviction is affirmed.

Affirmed

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

## APPENDIX B

In the
United States Court of Appeals
for the Seventh Circuit

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September Term, 1969—January Session, 1970

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No. 17473

Louis E. McMahan,
Defendant-Appellant,

v.

United States of America,
Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Southern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of conviction of the said district court be and the same are hereby, affirmed, in accordance with the opinion of this court filed this day.